

TIC-The Industrial Company Southeast, Inc. and International Brotherhood of Electrical Workers, Local Union No. 183, AFL-CIO and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 452, AFL-CIO. Cases 9-CA-32484 and 9-CA-32502

November 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 5, 1996, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions, a supporting brief, and a request for oral argument.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record¹ in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, TIC-The Industrial Company Southeast, Inc., Savannah, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it would avoid hiring applicants for employment because of their union membership or union activities.

(b) Interrogating employees about their union membership, union activities, or union sentiments of other employees.

(c) Failing and refusing to consider for hire applicants because they are members or supporters of International Brotherhood of Electrical Workers, Local Union No. 183, AFL-CIO, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 452, AFL-CIO, or any other union or because they

identify themselves on their applications as union organizers or as members of a union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer those employee-applicants named below, who would currently be employed but for the Respondent's unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

(b) Make the employee-applicants named below whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in

³ In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by its failure to consider union-affiliated employment applicants, we note that the General Counsel's prima facie case that hostility towards union members was a motivating factor in the Respondent's treatment of those applicants is supported both by independent evidence of animus and by evidence of disparate treatment of union-affiliated applicants and those without known union affiliation. In the latter regard, the Respondent gave instructions to the Kentucky Job Service to solicit reapplications from certain applicants whose forms had been incorrectly filled out and who thus were ineligible for consideration under the Respondent's stated policy, but this special treatment was withheld from union-affiliated applicants and afforded only to applicants without known union affiliation. We further find that the Respondent failed to present credible evidence that it would have declined to consider the union-affiliated applicants in any event because of their failure to comply with its application policy.

The Respondent also contends that the judge should not have included Robert Johnson in the group of discriminatees because his name was not included in the amended consolidated complaint. Contrary to the Respondent, we find that Johnson properly belongs with the other union-affiliated applicants whom the Respondent refused to consider. The record shows that during the hearing, his application was included in the batch of union-affiliated pipefitter applications that the Respondent turned over to the General Counsel pursuant to the General Counsel's subpoena (G.C. Exh. 11(b)). Moreover, the General Counsel read Robert Johnson's name and application into the record without any objection from the Respondent. Therefore, we agree with the judge that the Respondent's refusal to consider Johnson for employment was fully litigated and that he is properly included in the group as a discriminatee. See generally *Graham Windham Services*, 312 NLRB 1199 (1993).

The amended consolidated complaint contained both an 8(a)(3) and (1) refusal-to-consider and refusal-to-hire allegation. We note that the judge did not include in his findings a refusal-to-hire violation, and no party to these proceedings filed exceptions thereto. Therefore, we pro forma adopt the judge's disposition of this allegation.

⁴ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

¹ On consideration of the record, including the exceptions and brief, the Respondent's request for oral argument is denied as the record before us adequately presents the issues and positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

the manner set forth in the remedy section of the decision.

Stephen Bishop	Morris Patrick
James Centers	Donald Souleyrette
Gary D. Conley	Steven W. Withers
Darrell Lawson	Cecil Bolner
Marvin Patrick	David E. Clark
Sam Stine	Terry G. Jones
Vernon Turner	Kerry Meredith
Thomas Blankenship	Jim Skipper
David B. Chaffin	James Thompson
Roy Dawes	Robert Johnson
James Gilliam	

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful refusal to consider for employment the 21 employee-applicants named above and within 3 days thereafter notify the discriminatees in writing that this has been done and that it will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Mail a copy of the attached notice marked "Appendix"⁵ to the last known address of the employee-applicants named above and to all persons employed by the Respondent at its Trapp, Kentucky jobsite. Copies of the notice on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt thereof.

(f) Sign and return to the Regional Director for Region 9, sufficient copies of the notice for posting by the Unions, if they are willing at their offices and meeting halls, including all places where notices are customarily posted.

(g) Within 14 days after service by the Region, post at its Trapp, Kentucky jobsite copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 6, 1995.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell our employees that we will avoid hiring applicants for employment because of their union membership or union activities.

WE WILL NOT interrogate our employees about the union membership, union activities, or union sentiments of other employees.

WE WILL NOT fail and refuse to consider for hire applicants because they are members or supporters of the International Brotherhood of Electrical Workers, Local Union No. 183, AFL-CIO, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 452, AFL-CIO, or any other union or because they identify themselves on their applications as union organizers or as members of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, those employee-applicants named below for any losses they may have suffered of earnings and other benefits resulting from our discriminatory refusal to consider them for hire, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer those employee-applicants named

below, who would currently be employed but for our unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have been entitled to if we had not discriminated against them.

Stephen Bishop	Morris Patrick
James Centers	Donald Souleyrette
Gary D. Conley	Steven W. Withers
Darrell Lawson	Cecil Bolner
Marvin Patrick	David E. Clark
Sam Stine	Terry G. Jones
Vernon Turner	Kerry Meredith
Thomas Blankenship	Jim Skipper
David B. Chaffin	James Thompson
Roy Dawes	Robert Johnson
James Gilliam	

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider for employment the 21 employee-applicants named above, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that it will not be used against them in any way.

TIC-THE INDUSTRIAL COMPANY SOUTHEAST, INC.

David Ness, Esq., for the General Counsel.

Lawrence W. Marquess and Todd A. Fredrickson, Esqs. (Otten, Johnson, Robinson, Neff & Rigonetti), of Denver, Colorado, for the Employer.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. These cases were tried in Winchester, Kentucky, on August 17 and November 13 and 14, 1995, and in Lexington, Kentucky, on January 16, 1996.¹ On a charge filed in Case 9-CA-32484, on January 6, 1995, by International Brotherhood of Electrical Workers, Local Union No. 183, AFL-CIO (Local 183) and a charge and an amended charge filed in Case 9-CA-32502 on January 12 and February 10, 1995, respectively, by United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 452, AFL-CIO (Local 452) the Regional Director for Region 9 issued a complaint in Case 9-CA-32502 on February 17, 1995, and thereafter, on June 14, 1995, issued an order consolidating cases, consolidated complaint and notice of hearing, alleging that the Respondent, TIC-The Industrial Company Southeast, Inc. (TICSE), had engaged in unfair labor practices violating Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The consolidated complaint, as amended in these proceedings, alleged that on about August 23, TICSE violated Section 8(a)(3) and (1) of

the Act by refusing to hire or consider for employment the following job applicants because they were adherents of either Local 183 or of Local 452:

Stephen Bishop	Morris Patrick
James Centers	Donald Souleyrette
Gary D. Conley	Cecil Bolner
Darrell Lawson	David E. Clark
Marvin Patrick	Terry G. Jones
Sam Stine	Kerry Meredith
Vernon Turner	Jim Skipper
Thomas Blankenship	James Thompson
David B. Chaffin	Steven W. Withers
Roy Dawes	Robert Johnson ²
James Gilliam	

At the hearing, on August 17, 1995, over TICSE's objection, I granted the General Counsel's motion to amend the consolidated complaint to allege the following violations of Section 8(a)(1) of the Act:

(1) About late August 1994 TICSE, by James Smith, at its Trapp, Kentucky job, informed an employee that it was avoiding hiring applicants for employment because of their union membership or activities.

(2) About late August or early September 1994, TICSE, by Rick Queen, at its Trapp, Kentucky jobsite, interrogated an employee concerning other employees' union membership, activities, and sympathies, and solicited an employee to report to TICSE the identity of employees who were engaging in union activities.³

TICSE has denied the alleged unfair labor practices in these cases.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and TICSE, I make the following

FINDINGS OF FACT

I. JURISDICTION

TICSE, a corporation, has been engaged in industrial construction at Trapp, Kentucky. During the 12 months preceding issuance of the consolidated complaint, TICSE, in conducting its construction activity, purchased and received at its Trapp, Kentucky jobsite goods valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. TICSE admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 183 and Local 452, respectively,

² The consolidated complaint, as amended at the hearing, did not include Robert Johnson, a pipefitter, as one of the alleged discriminatees. However, as the circumstances of TICSE's refusal to consider him for employment have been fully litigated in these proceedings, I have included him as one of the applicants who allegedly suffered discrimination in these cases.

³ Contrary to TICSE's position, I find that the 8(a)(1) allegations in the amendments are closely related to the unfair labor practice charges which alleged unlawful discrimination against job applicants at TICSE's Trapp, Kentucky jobsite in August 1994. Accordingly I reaffirm my ruling permitting the General Counsel to amend the complaint at the hearing. *Outboard Marine Corp.*, 307 NLRB 1333, 1334 (1992).

¹ All dates are in 1994 unless otherwise indicated.

are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

In late February 1994, TICSE, a construction company with offices in Savannah and Atlanta, Georgia, began a project at Trapp, Kentucky, involving construction of three combustion turbine generating stations for the East Kentucky Power Cooperative. TICSE employed various crafts on the project, including electricians and pipefitter. TICSE operates as a nonunion employer, also described as a "merit shop contractor."

In hiring electricians and pipefitters for the Trapp project, TICSE gave a priority to employees who had worked at its Burgin, Kentucky project, 55 or 60 miles away, or at its other projects and to other employees who had worked for TIC Holdings companies. Under TICSE's hiring procedure for the Trapp project, "Prior employees of [TICSE] or TIC Holdings companies may be hired and brought directly to the jobsite for hire-in." All prior employees from TICSE or another TIC region were to be checked out with the appropriate home office for a reference. For former TICSE employees, references and a current application were to be checked at its Savannah office. If the employee did not have a current application on file in Savannah, or was from another TIC Holdings company, TICSE would hire the employee, and bring an application form to the Trapp jobsite.

TICSE recruited the remainder of its electricians and pipefitters through the Winchester office of the Kentucky Department of Employment Services (the Job Service). In February 1994, TICSE instructed the Job Service's Winchester office to comply with the following guidelines in recruiting electricians and pipefitters for TICSE's Trapp project:

PROCESSING TIC JOB APPLICATIONS

USE ONLY ORIGINAL TIC JOB APPLICATIONS
DO NOT PHOTO COPY APPLICATIONS CALL TIC
JOBSITE (606) 745-6612, NEW APPLICATIONS
WILL BE SENT

TIC DOES NOT WANT RESUMES ATTACHED
TO TIC'S APPLICATIONS

ONLY ACCEPT APPLICATIONS FOR THE POSI-
TIONS THAT ARE OPEN IF TIC IS HIRING LA-
BORS, DO NOT LET APPLICANTS WRITE: PIPE-
FITTER, CARPENTER, OR "ANY POSITIONS"

ALL TIC APPLICATIONS MUST BE FILLED
OUT IN INK ONLY APPLICATIONS FILLED OUT
IN PENCIL WILL NOT BE CONSIDERED VALID

DO NOT WRITE ANYTHING ON THE APPlica-
TION THAT IS NOT SPECIFICALLY REQUESTED
(IE; VET, BOY SCOUTS, UNION ORGANIZER)

TIC APPLICATION MUST BE FILLED OUT IN
PERSON APPLICATION SHOULD NOT LEAVE
THE JOB SERVICE OFFICE

In February 1994, TICSE's director for safety and employment, Terry D. Cooksey, met with Jim Little, an official of the Job Service's Winchester, Kentucky office, and instructed him on the application of the quoted guidelines. Cooksey

also gave Little a batch of TICSE's application forms, all bearing a "TIC" watermark in the lower right-hand corner. TICSE's records show that between February 21 and December 19, both dates inclusive, it hired 50 electricians, excluding foremen and general foremen, using its application forms and its guidelines. TICSE's records also show that from February 15 until November 29, it hired 67 pipefitters, excluding foremen, using the same forms and guidelines.

When TICSE began hiring for the Trapp project, it had no designated management person charged with picking up and screening employment applications at the Job Service's Winchester office. However, Cooksey noted that the Job Service was somewhat careless about the guidelines. He assigned Gary Adams, a management official familiar with the policy, to pick up and screen the completed applications. On August 1, Safety Manager Gary Knight supplanted Adams as emissary to the Job Service office. When TICSE sought to recruit laborers or individuals from a particular craft, Adams, and, later, Knight would contact the Job Service and make the appropriate request. The Job Service would publicize such requests on a bulletin board in its Winchester office.

Job Service officials would provide prospective TICSE employees with an application bearing the TIC watermark, a job description and instructions to complete the application, using a pen, at the Job Service's Winchester office, and turn the completed form in at the same office.

When the Job Service had accumulated a quantity of completed applications, it notified TICSE. Adams, and later, Knight went to the Job Service office, and screened the applications for compliance with TICSE's guidelines. They would take the complying applications back to the project's office for further processing. If an application were done in pencil or did not reflect the specific position the applicant was seeking, TICSE's representative would reject them and leave them with the Job Service. On two or three occasions, Adams or Knight instructed Job Service employee James B. Little, to call applicants and advise each of them to come in and fill out another application properly.⁴

A Job Service staff member wrote "Vet" on some otherwise properly completed TICSE job application. Adams saw and rejected these applications. However, he told Job Service staffers to call the applicants and suggest that they file new applications conforming to TICSE's guidelines "because there was some good workers in that group."⁵

TICSE had employed electrician John Barck at its Burgin, Kentucky job from October 8, 1993, until it laid him off in January. Barck had filled out a TICSE application for employment at the Burgin jobsite on October 8, 1993. At the end of May, or at the beginning of June, TICSE's area superintendent James Smith, called Barck, who was working for Brown & Root, and asked him to come to work at the Trapp site. Barck declined, but said he would be available when his current employment ended.

⁴ My findings regarding Adams and Knight's requests that the Job Service contact applicants and advise them to file new applications in conformity with the guidelines are based on James B. Little's credible testimony, which was uncontradicted. Little was a Job Service employee, working at its Winchester office at all times material to these cases.

⁵ I based my findings regarding Adams' instruction regarding the "vet" applications on Little's uncontradicted testimony.

Later in the summer, Barck asked Smith for a job at Trapp. Smith hired him and Barck reported for work on August 29. Once on the job, Barck asked Smith if TICSE needed more people. Smith replied that they did, but were not hiring through the Savannah office. Further, Smith remarked "that the only way they were taking applications is if you were a prior employee or if you were referred by somebody, in order to avoid bringing in union personnel."⁶

In early September, Foreman Rick Queen, in the course of a conversation with Barck at the Trapp job, asked Barck if he knew the people on the job site. Barck replied that he knew most of them. Queen went on to inquire if Barck knew if any of them were "union" and mentioned that TICSE suspected that two of the employees were union activists. Barck said that he did not know anyone on the job who was "union" or involved in union activity.⁷

On August 22, Local 183 mailed 10 applications for employment at TICSE's Trapp jobsite to the Job Service's Winchester office. A letter from Local 183, encouraging the Job Service to send the applicants to TICSE, accompanied the applications. Local 183's business representative and organizer Darrell Lawson was one of the applicants. Lawson and the nine members of Local 183, who submitted these applications used xerox copies of TICSE's application. In filling out their respective applications, Cecil Bolner, James Thompson, James Centers, Vernon Turner, James Gilliam, James Herring, Roy Dawes, and Darrell Lawson listed Local 183 as their most recent and only employer. Jim Skipper's application showed IBEW Local #776 as his most recent and only employer. Donald Souleyrette listed B & B Electric and United Electric as previous employers and did not list any IBEW local.

Local 452's business agent Randall Conley obtained xerox copies of TICSE's application and on or about August 17 made them available to members of the Local at a union meeting. Stephen Bishop, Sam Stine, Gary Conley, David Clark, Kerry Meredith, Thomas Blankenship, David Chaffin, Marvin Patrick, Morris Patrick, Steven Withers, Robert Johnson, and Terry Jones, respectively, received one of those copies from Randall Conley, filled it out, and submitted it to Randall. Only one of these applications showed Local 452 as the most recent employer. Morris Patrick did not list any pre-

vious employer. The remaining applications showed at least one previous employer. After writing "union organizer" on each of these applications, Business Agent Conley mailed them to the Job Service's Winchester office.

The applications sent by Locals 183 and 452 did not pass inspection. The Job Service's office in Winchester noted that the applications received from Local 183's electricians came by certified mail. Local 452's were found on a staff member's desk without any identification of their source. However, the Job Service staff concluded that both sets of applications had not been prepared at their office, that they were xerox copies, did not have the TICSE watermark on them, and that plumbers' and pipefitters' applications had extraneous information which TICSE did not want. They carried "union organizer" on their first pages.

On August 24, the Job Service mailed Local 183's applications and a copy of Local 183's letter, to Safety Manager Gary Knight, at TICSE's Trapp jobsite for further action. Knight inspected the applications and rejected them as unacceptable, under TICSE's guidelines. He noticed that they had been mailed in, that they lacked watermarks and that some of the questions had been answered incorrectly. Knight mailed these applications to his superior, TICSE's director of personnel and safety, Terry D. Cooksey, who concurred in Knight's appraisal, and returned them to the Job Service along with a copy of Local 183's cover letter of August 24.

Knight and Cooksey also rejected the pipefitters' applications which had "union organizer" written on them. Knight also noted that some of these applications were incomplete. After returning them to the Job Service, Knight retrieved them and mailed them to Cooksey. After inspecting what he believed were copies of watermarked applications which had been filed at the Job Service, Cooksey noted the "union organizer" inscriptions, which were extraneous information, and for that reason found them unacceptable.

Cooksey retained the pipefitters' applications in anticipation of a trial involving the applicants. He believed that union organizers had filed these unacceptable applications. Thus, when asked why he thought there would be such a trial, Cooksey testified:

Because they—it was obvious, the tactic of force-feeding applications, breaking every hiring procedure we established. I felt like they said, "we're not gonna follow your rules. We're union organizers, now what are you gonna do about it."

TICSE did not offer the applicants from Local 183 or those from Local 452 any opportunity to submit new applications conforming to TICSE's guidelines.

B. Analysis and Conclusions

An employer's refusal to hire a job applicant because of his or her union affiliation violates Section 8(a)(3) and (1) of the Act. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993). Following Board policy, if the General Counsel has made a prima facie showing that TICSE's hostility toward union members was a motivating factor in its refusal to hire either the applicants from Local 183, or those from Local 452, for employment at its Trapp, Kentucky jobsite, I will find such refusal to hire to be unlawful unless TICSE shows, as an affirmative defense, that it would have rejected those appli-

⁶ Before me, Superintendent Smith, by answering no to a leading question denied ever informing an employee that TICSE was avoiding hiring applicants for employment because of their union membership or activities. Similarly, Smith, answering no to a leading question, denied telling Barck that he, Smith, was avoiding hiring union employees. However, TICSE's counsel did not permit Smith to provide his recollection of any conversation he might have had with Barck on August 29 or at anytime during Barck's employment at the Trapp project. In contrast, Barck seemed to be providing his best recollection, in a frank and forthright manner as he testified about Smith's remarks to him on that date. Accordingly, I have rejected Smith's denials and have credited Barck in this regard.

⁷ Rick Queen admitted that he talked to Barck "every day for a month and a half." However, Queen denied ever asking Barck about union affiliations of other employees on the Trapp jobsite. Instead, according to Queen, their conversations touched on his selection of Butch Dally as a foreman, Barck's criticism of Dally's ability and Barck's negative attitude toward Queen's appointment as general foreman. However, as Barck seemed a candid witness, and Queen admitted that he had frequent conversations with him every working day for 1-1/2 months, I have credited Barck in this regard.

cants even in the absence of their union affiliation. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-403 (1983), affg. *Wright Line*, 251 NLRB 1083 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). If the record shows that the reason or reasons which TICSE has offered to explain its failure to consider the 9 applicants from Local 183 and the 12 applicants from Local 452 do not exist or were not in fact relied on—it necessarily follows that TICSE has not met its burden and the inquiry is logically at an end. *Wright Line*, 251 NLRB at 1084.

When Cooksey and Knight decided to reject the nine applications from Local 183, they were aware of the applicants' union affiliations. The cover letter from Local 183, and the assertions on seven of the applications that Local 183 was the applicant's most recent employer, showed that nexus. The inscription "union organizer" on the 12 applications from the pipefitters told Cooksey and Knight that each of the applicants was a union man. Cooksey's testimony regarding his retention of the 12 copies shows that he was aware of their union involvement.

The record shows that TICSE's management was anxious to keep union supporters from working at the Trapp jobsite in August and September 1994. Thus I have found above that in late August, Area Superintendent Smith told employee Barck that TICSE needs to hire more employees for the Trapp job, but that it was seeking to avoid hiring union personnel. As Smith's remark was likely to cause a listening employee either to abandon union activity or to avoid involvement in it, rather than risk discharge by TICSE, I find that it violated Section 8(a)(1) of the Act. I also find that Superintendent Smith's remark suggested that TICSE was likely to avoid hiring applicants who identified themselves as union members.

Further evidence of TICSE's anxiety surfaced during Foreman Rick Queen's encounter with Barck in late August or early September 1994. On that occasion, Queen asked Barck if he knew any employees at the Trapp project who were affiliated with a union and suggested that TICSE was keeping an eye on two employees suspected of involvement in union activities. In light of Smith's unlawful remarks which raised the spectre of discrimination against union members and Foreman Queen's suggestion that TICSE was on the lookout for union members who might be working at Trapp, I find that Queen's question to Barck also violated Section 8(a)(1) of the Act.

In sum, I find that the record shows that TICSE rejected Local 183 and Local 452 applicants at a time when it knew of their union affiliations and when its management was trying to keep the Trapp job clear of union members. Thus has the General Counsel made a prima facie showing that the union affiliation of the 21 rejected job applicants was a motivating factor in TICSE's decision to reject them.

TICSE urges dismissal of the allegations that its rejection of the 21 applicants violated Section 8(a)(3) and (1) of the Act. In support of its position TICSE offered Knight's and Cooksey's testimony that they rejected the 21 applications because they did not comply with TICSE's guidelines. Both Knight and Cooksey testified that their knowledge, that both sets of applications came from union members, played no part in their decisions to reject them. However, James Little's credited testimony cast serious doubt on the credibility of

Knight's and Cooksey's testimony in support of TICSE's defense.

The record shows that in contrast with its treatment of other applicants, TICSE did not give the 21 union applicants a second chance to file proper applications. Thus, I have found from Little's testimony that on two or three occasions, Knight, or his predecessor Gary Adams, urged Little to contact Trapp job applicants, who had filed unacceptable applications and urge them to come to the Job Service office and fill out a second application in compliance with TICSE's guidelines. In those instances, there was no showing that the rejected applications carried any suggestion that the applicants were affiliated with a union. Little's testimony also showed that Gary Adams rejected applications on which the Job Service had written "vet" and then urged Little to get in touch with the applicants to ask them to fill out new applications and omit the "vet" inscription. Here, again, there was no showing that the rejected applications identified the applicants as union members.

TICSE's proffered defense of its treatment of the 21 applicants does not include any effort to explain why it did not offer them a second opportunity to comply with its guidelines. Neither Cooksey nor Knight testified about this disparity in the treatment they accorded those applicants. This gap in their testimony suggests that TICSE was more interested in camouflaging the real reason for rejecting the 21 applicants than it was in dealing frankly with the issue raised by Little's testimony. Knight's and Cooksey's testimony in this regard provided only a pretext for the discrimination against the 21 applicants. Therefore, I find that TICSE has failed to meet its *Wright Line* burden of proof. TICSE did not rebut the General Counsel's prima facie showing of unlawful motive. Accordingly, I further find that TICSE violated Section 8(a)(3) and (1) of the Act by refusing to consider the following employees for hire at its Trapp, Kentucky jobsite:

Stephen Bishop	Morris Patrick
James Centers	Donald Souleyrette
Gary D. Conley	Cecil Bolner
Darrell Lawson	David E. Clark
Marvin Patrick	Terry G. Jones
Sam Stine	Kerry Meredith
Vernon Turner	Jim Skipper
Thomas Blankenship	James Thompson
David B. Chaffin	Steven W. Withers
Roy Dawes	Robert Johnson
James Gilliam	

TICSE contends that Local 183's applicants were not entitled to the protection of the Act on the ground that the testimony of the Local's organizer, Darrell Lawson, shows that, had TICSE hired them, they would have attempted to cripple the Trapp job by encouraging key employees to abandon Trapp and work elsewhere. However, assuming that such an attempt would have been unprotected activity, there was no showing that Lawson had recruited applicants to engage in such conduct, or that Lawson had embarked on such conduct. Thus, I find TICSE's contention based wholly on speculation drawn from Lawson's testimony. Such speculation does not excuse TICSE's unlawful refusal to consider Lawson and the other Local 183 applicants because of their union affiliation. *Godsell Contracting*, 320 NLRB 871 (1996).

CONCLUSIONS OF LAW

1. By telling an employee that TICSE was avoiding hiring applicants for employment because of their union membership or union activities, TICSE has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By interrogating an employee concerning other employees' union membership, union activities, and union sentiments, TICSE violated Section 8(a)(1) of the Act.

3. TICSE violated Section 8(a)(3) and (1) of the Act by failing and refusing to consider for employment the following job applicants because of their union affiliation or membership:

Stephen Bishop	Morris Patrick
James Centers	Donald Souleyrette
Gary D. Conley	Cecil Bolner
Darrell Lawson	David E. Clark
Marvin Patrick	Terry G. Jones
Sam Stine	Kerry Meredith
Vernon Turner	Jim Skipper
Thomas Blankenship	James Thompson
David B. Chaffin	Steven W. Withers
Roy Dawes	Robert Johnson
James Gilliam	

REMEDY

Having found that Respondent TICSE has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that TICSE violated the Act by refusing to consider the employee-applicants listed above, I shall follow the Board policy expressed in *H. B. Zachry Co.*, 319 NLRB 967 (1995), and leave to compliance the determination of which of these employee-applicants would have been hired for the Trapp job if TICSE had given them an opportunity to submit an application which complied with TICSE's guidelines.⁸

I shall also recommend that TICSE be ordered to consider these 21 employee-applicants for hire and to provide backpay to those whom it would have hired but for its unlawful conduct. Further, if at the compliance stage of this proceeding it is found that TICSE would have hired any of the 21 employee-applicants, the determination of the amount of backpay due these individuals will include any amounts they would have received on other jobs to which TICSE would later have assigned them. Finally, if at the compliance stage it is established that TICSE would have assigned any of these discriminatees to current jobs, I shall recommend that TICSE be ordered to hire those individuals and place them in positions substantially equivalent to those for which they applied at the Trapp, Kentucky jobsite.⁹

[Recommended Order omitted from publication.]

⁸ Such consideration by the Respondent shall commence for each discriminatee as of the date TICSE rejected his application, or on or about August 23, the date set forth in the consolidated complaint.

⁹ Should any of these employee-applicants be entitled to backpay, it shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).